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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

No. 288

LYKES BROS. STFAMSHIP CO. INC.,
*Petitioner,*

*vs.*

FRANK CANNELLA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Lykes Bros. Steamship Co. Inc. prays that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on May 31, 1949.

### Opinions Below.

The opinions of the Court of Appeals are reported in 174 Fed. (2d) 794. The first opinion is in the Record at 182-A and the supplemental opinion at 204-A. The Opinion of the District Court is not reported (Rec. 147-A).

## Jurisdiction.

The judgment of the Court of Appeals was entered on the 31st day of May, 1949 (Rec. 208-A). The jurisdiction of the court is invoked under 28 U. S. C. 1254(1). The time for presenting the petition expires on August 29, 1949.

## Questions Presented.

The question presented is:—whether a shipowner whose vessel is requisitioned by the United States under bareboat requisition charter party is liable to a longshoreman for injuries caused by unseaworthiness of the vessel while she is in the possession of the United States under requisition charter party, and the provisions of that charter party negative any warranty of seaworthiness.

## Statement.

The *SS. Nemaha* was owned by the Petitioner and was requisitioned by the United States under bareboat requisition charter party. Under this charter party all the incidents of ownership passed to the United States.

The respondent, a longeshoreman, was working on a lighter alongside the *Nemaha*. There was a Jacob's ladder extending from the deck of the ship to the lighter. While ascending the ladder at 7:45 P. M. on February 19, 1945, the respondent fell from the ladder to the lighter and sustained injuries. The longshoreman had been using this ladder since 8 o'clock in the morning of that day. The respondent claims that his fall was caused by a breaking of a rung in the ladder.

The respondent brought suit against Lykes Bros. Steamship Co. Inc. alleging two causes of action—one

based upon unseaworthiness and a second based on negligence under the Jones Act. The first cause of action was dismissed at the end of the plaintiff's case, the second cause of action was permitted to go to the jury which returned a verdict in respondent's favor in the sum of $12,000. This was set aside by the District Judge and the action dismissed.

In its opinion the District Court said:

> "The fact is not here disputed that at the time of plaintiff's injuries, the *SS. Nemaha,* although owned by the defendant, was nevertheless under requisition bareboat charter to the United States. Under that charter, the United States had all of the incidents of ownership of the vessel for the charter period (Rec. 148-A).

The Court of Appeals held that the action was properly dismissed on the issue of negligence but held that the respondent was entitled to a new trial on the issue of unseaworthiness. In its first opinion the court said:

> "An owner, who has demised his ship, is not indeed liable to anyone but the demisee under his warranty of seaworthiness for any loss or injury suffered during the demise. Such liabilities sound in contract and he has not made any contract with anyone else. On the other hand, if the demisee has become liable to a third person because of an unseaworthiness existing at the time of the demise, the demisee may recover from the owner on the owner's warranty, whether the demisee is liable under his own warranty of seaworthiness, or under an imposed liability such as that to a longshoreman. Thus the ultimate liability rests upon the owner for any loss or injury occasioned by the ship's unseaworthiness at the time of delivery. If the demisee becomes insolvent or for any other reason is judgment proof,

> the longshoreman could probably join in one action the demisee and the owner; and at any rate he could accomplish the same result by two separate actions. Thus in final result to impose upon the owner-demisor a direct personal liability to a longshoreman for injuries resulting from an unseaworthiness antedating delivery, is to impose no greater loss than could be made to fall upon him as the law is. It would merely avoid a circuity of action."

In a Petition for a Re-hearing, it was pointed out that the charter party was not before the court, and that the court had assumed that the charter party between the United States and the Petitioner contained a warranty of seaworthiness. The petitioner further pointed out that the requisition Charter Party was published in the Federal register (for April 8, 1944) Vol. 9, part 4, page 3802, and that the Charter Party provided:

> "• • • the delivery of the Vessel by the Owner and the taking of the Vessel by the Charterer shall constitute a full performance by the Owner of all of the Owner's obligations under this Clause 1, and thereafter the Charterer shall not be entitled to make or assert any claim against the Owner on account of any agreements, representations or warranties, expressed or implied, with respect to the condition of the vessel."

The court denied a petition for a re-hearing, but modified its opinion as a result of the petition. It said:

> "It is true that in deciding that the owner of a demised ship was directly liable to a longshoreman for injuries caused by her unseaworthiness at the time of the demise, we used, as part of our reasoning, the fact that the loss would eventually fall upon the owner by a circuity of action. The longshoreman could recover of the demisee under *Seas Ship-*

*ping Co.* v. *Sieracki,* 328 U. S. 625, and the demisee could recover of the owner under the warranty. That is the ordinary situation and we adduced it to support our conclusion that the owner's direct liability involved very little practical change in the end result. Cumulatively, we invoked the privilege of the longshoreman to proceed against the ship in rem. We did not mean, however, that the direct liability was confined to cases in which the longshoreman could in fact avail himself of both or of either of these procedures. It would be particularly inappropriate in a given case to take as a test, whether the owner had excused himself from the warranty of seaworthiness ordinarily implied. By hypothesis the longshoreman is not a party to that contract, or to any contract, with the owner; and the question is of a liability imposed in invitum because of the ships' unseaworthiness. (*Seas Shipping Co.* v. *Sieracki,* 328 U. S. 625). It would therefore be irrelevant if the defendant at bar were to prove that the demise had excused it from implied warranty."

## Specifications of Errors to be Urged.

The United States Court of Appeals for the Second Circuit erred:

(1) in holding that the petitioner was liable to the respondent for injuries caused by the unseaworthiness of the *Nemeha* when it was out of possession of that vessel.

(2) In holding that the petitioner as owner of the *Nemeha* when out of possession was liable to the respondent, a longshoreman, for injuries caused by the unseaworthiness of the vessel, even though it had been delivered to the United States under a demise charter which negatived any warranty of seaworthiness.

## Reasons for Granting the Writ.

The decision of the Court of Appeals is clearly erroneous and it is in conflict with the decision of the Court of Appeals of the State of New York in *Muscelli* v. *Frederick Starr Contracting Co.*, 296 N. Y. 330 and with the decision of the Court of Appeals for the First Circuit in *Vitozi* v. *Balboa Shipping Co.*, 163 Fed. (2d) 286.

This case presents an important question of admiralty and maritime law which will affect all demise chartering operations, both private and public.

The Court of Appeals has held that an owner who charters a vessel without warranty as to her condition and with the express provision that there are no warranties as to seaworthiness is nevertheless liable for injuries to longshoremen which occur when the vessel is in possession of the demise charterer for any injuries that may have occurred due to any unseaworthiness existing at the time of the delivery of the vessel to the demise charterer. This rule, if upheld, will place an additional burden on the owner and will prevent many chartering operations. An owner of a laid up vessel will not be able to enter into a demise charter of that vessel to a person who is willing to put the vessel in condition for service because of the obligations and liabilities imposed by the decision in the case at bar. This decision means that an owner under those circumstances will be liable for any injuries caused by the unseaworthiness of the vessel at the time of delivery under the charter party regardless of what contract he makes with the charterer.

The decision of the Court of Appeals admits they are placing a new burden on a shipowner never heretofore imposed by any court. The court said (Rec. 184-A):

> "In the case at bar the defendant was not in possession of the ship, as owner, when the plaintiff was injured; neither was it an 'owner pro hac vice' by virtue of its possession under the operating contract. (*Caldarola* v. *Eckert,* 332 U. S. 155). Was there nevertheless a direct personal liability running from it to the plaintiff? Is that a proper corollary of *Seas Shipping Co.* v. *Sieracki, supra;* and, if so, what are the limits of such a liability. In the only two cases where the question has come up, it must be owned that the answer has been 'no'. (*Muscelli* v. *Frederick Starr Contracting Co.,* 296 N. Y. 330. *Vitozi* v. *Balboa Shipping Co.,* 163 Fed. (2d) 286 (C. A. 1)."

Judge Chase in his dissenting opinion said of the majority (Rec. 189-A):

> "Their path seems to rest on these assumptions: (1) the owner is liable over to the charterer because of an implied warranty of seaworthiness; (2) the longshoreman has a maritime lien on the ship in any case as a result of unseaworthiness; and (3) the owner's position is no worse and perhaps better, if he is directly liable because he may be able to limit his liability. "However desirable it may be to simplify litigation, this decision seems to extend the owner's warranty of seaworthiness under a bare boat charter not only directly to longshoreman and, of course, to seamen, but to make it a warranty to them of initial seaworthiness during the period when the owner has no control over the vessel even though the charterer might have eliminated or miti-

gated the effect of an apparent defect existing at the time of delivery. * * * Apparently, this is hereafter to be so in this circuit even though any implied contractual warranty of seaworthiness has been negatived in express terms in the charter."

In the Supplemental Opinion denying a re-hearing the court held that the longshoreman could sue the shipowner for breach of a warranty of seaworthiness existing at the time of the delivery of the vessel to the demise charterer regardless of the provisions of that charter party. The court said (Rec. 205-A):

> It is true that in deciding that the owner of a demised ship was directly liable to a longshoreman for injuries caused by her unseaworthiness at the time of the demise, we used, as part of our reasoning, the fact that the loss would eventually fall upon the owner by a circuity of action. The longshoreman could recover of the demisee under *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 625, and the demisee could recover of the owner under the warranty. That is the ordinary situation and we adduced it to support our conclusion that the owner's direct liability involved very little practical change in the end result. Cumulatively, we invoked the privilege of the longshoreman to proceed against the ship in rem. We did not mean, however, that the direct liability was confined to cases in which the longshoreman could in fact avail himself of both or of either of these procedures. It would be particularly inappropriate in a given case to take as a test, whether the owner had excused himself from the warranty of seaworthiness ordinarily implied. By hypothesis the longshoreman is not a party to that contract, or to any contract, with the owner; and the question is of a liability imposed in invitum because of the ship's unseaworthiness. (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 625).

It would therefore be irrelevant if the defendant at bar were to prove that the demise had excused it from implied warranty."

The decision of the Court of Appeals in the case at bar is in direct conflict with that of the Court of Appeals for the State of New York in *Muscelli* v. *Frederick Starr Construction Company*, 296 N. Y. 330, and that of the Court of Appeals for the First Circuit in *Vitozi* v. *Balboa Shipping Co.* 163 Fed. (2) 286.

In *Muscelli* v. *Frederick Starr Construction Company*, *supra* the plaintiff, an employee of a sand and gravel company, had gone to work on a vessel which his employer had chartered from the defendant about five months before the accident. He was injured when a "wearing" strip—a sort of outside planking around the craft—broke and collapsed. The wearing strip was in bad condition when the plaintiff's employer took possession under the charter. The Court of Appeals said, page 334:

> "The charter, which was in writing, recited that the hiring was on a 'daily bare boat' basis. It required the charterer (plaintiff's employer) to make at its expense 'all repairs and changes both to hull and machinery' and, at the end of the charter period, to return the craft to defendant in as good condition as when taken, ordinary wear and tear excepted. * * * It is entirely clear, if not conceded, that this was a demise charter, one where the entire control and possession of the vessel, and subsequent control over her navigation is 'surrendered to the charterer' who thus becomes her 'special owner' (*Leary* v. *United States*, 14 Wall. (U. S.) 607, 611). Such a charterer is clothed with 'the character or legal responsibility of ownership' (*Reed* v. *United States*, 11 Wall. (U. S.) 591, 601) and is the owner for the voyage without any sale or purchase

> of the ship. * * * Such a pro hac vice ownership, we think, casts all responsibility onto the charterer, and makes it impossible to hold defendant, the actual owner, liable here."

and at 336:

> "A charterer under a demise charter, that is, a charterer who is in full command and custody of the ship, is the owner pro hac vice with all the rights and obligations of an owner."

The Court of Appeals for the First Circuit in *Vitozi* v. *Balboa Shipping Co. Inc.*, 163 Fed. (2d) 286 had the same question before it. The plaintiff was a longshoreman injured by a defective winch. A motion was made for summary judgment on the ground that the defendant was not in possession and control of the vessel on the date when the plaintiff alleged that he was injured and the ship was at that time under a demise charter to the plaintiff's employer, United Fruit Company.

The court duly granted the defendant's motion and entered judgment accordingly. This judgment was affirmed upon appeal, the court saying:

> "In a charter of this kind in which the owner surrenders entire control and possession of the vessel and consequent control over its navigation to the charterer, the latter becomes what is called the owner pro hac vice. That is to say 'without any sale or purchase of the ship' the charterer becomes its owner for the term of the charter 'with the character or legal responsibility of ownership.' Reed *v.* United States, 11 Wall. 591, 600, 601, 78 U. S. 591, 600, 601, 20 L. ed. 220. Differently expressed the charterer under a demise charter party becomes the 'owner of the vessel chartered for the voyage or service stipulated, and consequently becomes sub-

ject to the duties and responsibilities of ownership'. Leary *v.* United States, 14 Wall. 607, 610, 81 U. S. 607, 610, 20 L. Ed. 756. See also United States *v.* Shea, 152 U. S. 178, 14 S. Ct. 519, 38 L. Ed. 403.

Certainly if under federal law a demise charter party casts the duties and responsibilities of ownership upon the charterer, under federal law it must cast upon him the duty and responsibility to see to it that the vessel is seaworthy during the term of the charter, even though it may not have been seaworthy at the time when the charter party was entered into. On this reasoning two courts in cases in point have held the shipowner not liable. In re New York Dock Co., 2 Cir., 61 F. 2d 777; Muscelli *v.* Frederick Starr Contracting Co., 296 N. Y. 330, 73 N. E. 536. We consider these cases correctly decided.

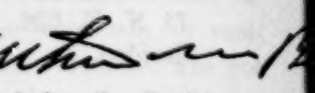
It has always been the rule that a demise charterer for the charter period had all of the incidents of ownership of the vessel including the right to limit liability. The Court of Appeals suggests that in the case at bar the owner out of possession could limit his liability, but there is nothing in the limitation statute which justifies that conclusion. That statute provides that a demise charterer shall be deemed the owner, but nowhere states, either directly or by implication, that both the owner and the owner *pro hac vice* shall have the right to limit. It has always been assumed that the two terms "owner" and "owner *pro hac vice*" were mutually exclusive. The provisions of the statute, U. S. C. Anno. Title 46, Section 186 are as follows:

> "The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of

the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

It is submitted that the decision of the Court of Appeals is erroneous, that it is in conflict with the decision of the New York Court of Appeals, with the decision of the Court of Appeals for the First Circuit, that it makes a drastic change in the admiralty and maritime law and will disturb the practice of demise charterers which has been going on for a long time and which the shipping industry has understood and relied upon.

Respectfully submitted,



Counsel for the Petitioner.

August, 1949.